<u>Elliott v. Bevin</u> – Critical Issues at Stake

In recent months, Governor Matthew Bevin issued three executive orders which removed Thomas K. Elliott, an appointed member and Chair of the Kentucky Retirement Systems (KRS) Board of Trustees, from the board, appointed another person to fill his position, and abolished and reconstituted the board, along with several other major changes. Mr. Elliott and elected trustee, Mary Helen Peter, filed a lawsuit challenging Governor Bevin's executive orders. The lawsuit seeks to have Kentucky's courts determine whether The Governor has the legal authority or "absolute power" to take such actions involving a legislatively created quasi-independent agency.

KRS Executive Director, William A. Thielen, approved the payment of the legal fees for trustees who are parties in the case under Kentucky Revised Statutes 61.645(2)(g) because the issues involved arise out of the performance of their duties as trustees. KRS 61.645(2)(g) states: "The board shall reimburse any trustee, officer, or employee for any legal expense resulting from a civil action arising out of the performance of his official duties."

The limit of the Governor's power, as exercised in this matter, is an extremely important issue involving the separation of the executive and legislative powers of government under the Kentucky Constitution. The outcome of the case will affect not only Kentucky Retirement Systems, but numerous other State boards, commissions and authorities. An important underlying principle of "fiduciary independence" is also at stake.

Fiduciary independence is a critical principle applicable to public retirement systems. The need for fiduciary independence was clearly and unambiguously recognized in the *Uniform Management of Public Employee Retirement Systems Act* adopted in 1997 by the National Conference of Commissioners on Uniform State Laws – an organization created in and operating since 1892. The comments to the uniform act state as follows:

> *"Trustees are different from other state actors because they are subject to an extensive and stringent set of fiduciary obligations to retirement system participants and beneficiaries."* . . . . *"Independence is required because it permits trustees to perform their duties in the face of pressure from others who may not be subject to such obligations. In the absence of independence, trustees may be forced to decide between fulfilling their fiduciary obligations to participants and beneficiaries or complying with the directions of others who are responding to a more wide-ranging (and possibly conflicting) set of interests."* . . . .

In support of this important principle of fiduciary independence, KRS 61.650(1) states:

> (c) "A trustee, officer employee, or other fiduciary shall discharge duties with respect to the retirement system:
>
> 1. Solely in the interest of the members and beneficiaries;

2. For the exclusive purpose of providing benefits to members and beneficiaries and paying reasonable expenses of administering the system. . . .

The implementation of the Governor's executive orders will severely restrict the fiduciary independence of the KRS Board of Trustees. In fact, the proposal to move all KRS employees under the state personnel system and the proposal to subject KRS to the state procurement code and contract review subcommittee processes actually leave final control over many decisions in the hands of the Secretary of Personnel and the Secretary of Finance and Administration, respectively, rather than the KRS Board of Trustees. These proposals put the Secretary of Personnel and the Secretary of Finance and Administration in the position of wearing two hats – one as a fiduciary with obligations strictly to the systems members and beneficiaries and the other subject to the ultimate control of the Governor with obligations to the State's general public and taxpayers that are much different and broader.

Finally, Kentucky Retirement Systems was named as a defendant in the suit for two reasons: 1) so that the Board of Trustees would be bound by the terms of any temporary injunction that might be issued; and, 2) so that the Board of Trustees would be bound by an order of the court supporting the payment of legal fees under KRS 61.645(2)(g).